UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ERROL I. DUNKLEY	:	
	:	PRISONER
v.	:	Case No. 3:03CV1913 (WWE)
	:	
THERESA LANTZ	:	

MEMORANDUM OF DECISION

The petitioner, Errol I. Dunkley ("Dunkley"), is an inmate confined at the Corrigan-Radgowski Correctional Institution in Uncasville, Connecticut. He brings this action pro se for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, to challenge his 1995 conviction for burglary in the first degree. For the reasons that follow, this petition will be dismissed in part and the case will be stayed as to the remaining claims.

I. Standard of Review

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson,

404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." See O'Sullivan, 526 U.S. at 845.

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must have "utilized all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). "To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state." Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514

U.S. 1054 (1995) (internal citations and quotation marks omitted). See also Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) ("[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition."); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (same).

II. Procedural History

On July 17, 1995, after a jury trial in the Connecticut Superior Court for the Judicial District of New Haven, Dunkley was found guilty of burglary in the first degree. On September 15, 1995, he was sentenced to a term of imprisonment of eighteen years, execution suspended after fifteen years, followed by five years probation.

Dunkley appealed his conviction on four grounds: (1) insufficiency of the evidence, (2) improper denial of his motion to suppress the "out-of-court show-up identification," (3) improper admission into evidence of an out-of-court photographic identification and (4) request for reconsideration of the Whelan-Newsome rule. On November 18, 1997, the Connecticut Appellate Court affirmed Dunkley's conviction. See State v. Dunkley, 47 Conn. App. 914, 702 A.2d 672 (199&). Dunkley did not file a petition for certification

to the Connecticut Supreme Court.

On March 17, 1998, Dunkley filed a petition for writ of habeas corpus in state court. The amended petition, filed on February 9, 1999, with the assistance of counsel, contained two claims: ineffective assistance of retained counsel in the underlying criminal trial and ineffective assistance of retained counsel because trial counsel failed to disclose that he had a conflict of interest in that, at the time of trial, he simultaneously represented Dunkley and a potential trial witness. The state court conducted a trial on the petition. On May 15, 2000, the court denied the petition. The Connecticut Appellate Court dismissed Dunkley's appeal and the Connecticut Supreme Court denied his petition for certification. See Dunkley v. Commissioner of Correction, 73 Conn. App. 819, 810 A.2d 281 (2002), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003).

On May 15, 2003, Dunkley commenced a habeas corpus action in federal court. He challenged his conviction on four grounds: (1) his trial counsel rendered ineffective assistance because the attorney had a conflict of interest, (2) the trial court improperly refused to suppress an out-of-court identification, (3) the victim was under the influence of drugs and (4) the evidence was insufficient to establish

his guilt. The respondent moved to dismiss because Dunkley had not exhausted his state court remedies with regard to three grounds for relief. In response, Dunkley moved to withdraw the petition without prejudice. The court granted Dunkley's motion and directed the Clerk to close the case. See Dunkley v. Lantz, No. 3:03cv865(CFD)(WIG) (D. Conn. Sept. 29, 2003) (entry of judgment).

On October 8, 2003, Dunkley filed a motion with the Connecticut Supreme Court seeking suspension of the rules to enable him to file a late petition for certification. (See Resp't's Answer App. E.) Dunkley did not attach a proposed petition for certification to his motion. On November 12, 2003, the Connecticut Supreme Court denied the motion. (See Resp't's Answer App. G.)

By petition dated November 5, 2003, Dunkley commenced this action seeking review of his conviction pursuant to 28 U.S.C. § 2254. In February 2004, Dunkley filed an amended petition.

III. Discussion

As an initial matter, respondent has filed a motion for extension of time, nunc pro tunc, to file her response to the court's order to show cause. Respondent's motion is granted.

In his amended petition, consisting of the court's

current habeas petition form with attached pages from the original petition, Dunkley asserts what appear to be ten grounds for relief: (1) denial of effective assistance of counsel, conflict of interest; (2) failure to call alibi witnesses; (3) failure to investigate case before trial; (4) conflict of interest; (5) denial of effective assistance of counsel, conflict of interest; (6) "the court err in suppress of one-on-one show-up identification as well as Maria Alvardo's out of court identification"; (7) "the victim, Randy Garcia, was under the influence of drugs known as (illy) pcp"; (8) insufficient evidence to establish Dunkley's guilt; (9) "should this court reconsider the Whelan-Newsome rule"; and (10) "Randy Garcia recanted his statement to the police. Stating the police provided him with the information." Grounds 1-5 all reiterate issues addressed in Dunkley's state habeas petition. Grounds 6, 8 and 9 are restatements of issued included in Dunkley's direct appeal. Grounds 7 and 10 do not appear to have been included in the direct appeal or the state habeas petition.

Dunkley has exhausted his state court remedies with regard to the issues contained in his state habeas petition, i.e., grounds 1-5 in the amended petition. He has not, however, presented any issued asserted in his direct appeal to

the Connecticut Supreme Court. Although Dunkley filed a motion asking the Connecticut Supreme Court to permit him to file a late petition for review, he did not include a proposed petition for certification. Thus, when it denied the motion, the Connecticut Supreme Court was not aware of what issues Dunkley wanted to raise. However, respondent does not argue that grounds 6, 8 and 9 are not exhausted.

Respondent does contend that Dunkley has not exhausted his state court remedies with regard to the claim that the victim was under the influence of drugs at the time he gave a statement to police. In addition, the court can discern no place in the record suggesting that Dunkley has even attempted to exhaust his state court remedies with regard to the claim that the victim recanted his statement. Dunkley did not raise these claims on direct appeal. Thus, even if the court were to accept the Connecticut Supreme Court's denial of Dunkley's motion to suspend the time limitations as evidence of exhaustion, grounds 7 and 10 would not be considered exhausted. The court concludes that Dunkley has not exhausted his state court remedies with regard to all grounds for relief contained in this petition.

Because Dunkley has not exhausted all of his grounds for relief, this is a mixed petition, including exhausted and

unexhausted claims. The United States Court of Appeals for the Second Circuit has cautioned the district courts not to dismiss a mixed petition containing exhausted and unexhausted claims where an outright dismissal would preclude petitioner from having all of his claims addressed by the federal court. The Second Circuit advised the district court to stay the petition to permit petitioner to complete the exhaustion process and return to federal court. See Zarvela v. Artuz, 254 F.3d 374, 380-83 (2d Cir. 2001) (recommending that the district court stay exhausted claims and dismiss unexhausted claims with direction to timely complete the exhaustion process and return to federal court "where an outright dismissal 'could jeopardize the timeliness of a collateral attack.'").

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended §2244(d)(1) to now impose a one year statute of limitations on federal petitions for a writ of habeas corpus challenging a judgment of conviction imposed by a state court:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or

> the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d). A petition for writ of habeas corpus filed in federal court does not toll the limitations period. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

The Connecticut Appellate Court affirmed Dunkley's conviction on November 18, 1997. Because he did not file a petition for certification to the Connecticut Supreme Court, the limitations period began to run on December 8, 1997, at the expiration of the twenty-day period within which Dunkley could have filed a petition for certification.

The limitations period was tolled 98 days later, on March 17, 1998, when petitioner filed his state habeas petition.

The Connecticut Supreme Court denied certification on the appeal of the denial of the state habeas petition on March 11, 2003. On that date, the limitations period again began to run for 210 days, until Dunkley filed his motion with Connecticut Supreme Court on October 8, 2003. The limitations period was tolled until the Connecticut Supreme Court denied Dunkley's motion on November 12, 2003. At that time the limitations period resumed for the remaining 57 days, until January 8, 2004. Thus, if the court were to dismiss this case, Dunkley would be time-barred from filing another federal petition. Accordingly, the court will stay the case as to the exhausted claims.

IV. Conclusion

The amended petition for writ of habeas corpus [**Doc. #10**] is hereby **DISMISSED** without prejudice as to the claim that the victim was under the influence at the time he gave a statement to the police and that he recanted his statement. The petition is **STAYED** as to all remaining claims. Dunkley is directed to commence proceedings immediately in the state court to exhaust the claims that have been dismissed and to file proof that he has done so. If, within thirty (30) days from the date of this order, the court has not received proof that Dunkley has commenced state proceedings to exhaust these

claims, the case will be dismissed as a mixed petition.

In addition, respondent's motion for extension of time nunc pro tunc to file her response [**doc. #20**] is **GRANTED**. Dunkley's motions for immediate relief [**docs. ##13, 16, 23**] are **DENIED**

The Supreme Court has held that,

> [w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). In addition, the Court stated that, "[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id. This court concludes that a plain procedural bar is present here; no reasonable jurist could conclude that Dunkley has exhausted his state court remedies with regard to all grounds for relief contained in this petition. Accordingly, a

certificate of appealability will not issue.

SO ORDERED this 17th day of September, 2004, at Bridgeport, Connecticut.

_____/s/_____
Warren W. Eginton
Senior United States District Judge